In the

Supreme Court of the United States.

OCTOBER TERM, 1945.

JUDSON L. THOMSON MANUFACTURING COMPANY,
PETITIONER,
v.
FEDERAL TRADE COMMISSION,
RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion in the United States Circuit of Appeals for the First Circuit is printed at pages 1113–25 of the record. The case has not yet been reported.

II.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936; 28 U.S.C. sec. 347). The judgment of the United States Circuit Court of Appeals for the First Circuit which the petitioner seeks to have reviewed was entered on July 31, 1945.

III.

STATEMENT OF THE CASE.

A statement of the questions involved in the case and the principal facts which have a bearing on these questions has been made in the petition for certiorari. The facts there stated are not repeated here. Certain additional facts which are material on the issue as to whether the finding of the Commission with respect to lessening of competition is supported by the testimony, are stated below:

Additional Facts as to Whether Competition Was Lessened.

At the present time there are eight companies, including the petitioner, which make and sell tubular and bifurcated rivets for industrial use, and put out automatic feed setting machines. The names of these companies and the dates when they entered the industrial field are as follows:

Tubular Rivet & Stud Co. Before 1889. R. 373, 302.
Judson L. Thomson Mfg. Co. 1889. R. 149.
Penn Rivet Corporation. 1914. R. 227, 615–617.
E. B. Stimpson Co. 1921. R. 348–349, 363.
Chicago Rivet & Machine Co. 1925. R. 727–728, 715–716.
Milford Rivet & Machine Co. 1927–30. R. 230.
National Rivet Co. 1928. R. 689–690.
Shelton Tack Co. 1930–32. R. 301; *cf.* 274.

The Tubular Rivet & Stud Company has the largest sales of any of these companies. See pages 27–28 below. Its practice is to lease machines and not to sell them. In October, 1940, it had 7412 machines on lease. R. 1014–15.

The Penn Rivet Corporation began making bifurcated rivets and leasing rivet-setting machines before 1914. R. 227. It began to sell machines about that time, and about

four years later began to make tubular rivets. The evidence as to the number of machines put out by that company before November, 1936, is incomplete. The witness Clarence L. Coombs testified that he personally sold about 1,000 machines for the Penn Rivet Corporation in the years from 1914 to 1917 and from 1920 to 1923. R. 616–618. There was no evidence as to the sales of Penn Machines by other agents during the same periods. The company has continued to lease and sell machines to the present time with the exception of a period beginning in 1932 and ending in 1936 during which it sold machines but made no new leases. R. 523, 530, 599–602, 605. Except as stated, there was no evidence as to the number of machines sold by this company before 1936. It has sold 1,000 or more machines since 1936. R. 530. It has about 500 machines on lease. R. 527.

The E. B. Stimpson Company began to sell tubular and bifurcated rivets about 1921. R. 363. It follows the practice of leasing or selling machines as the customer may desire. R. 348–349, 353. It has about 2,000 machines on lease and has sold about 300. R. 354.

The Chicago Rivet & Machine Company will sell or lease machines as its customers desire. R. 718. It started business in 1920 with a capital of $30,000, but did not enter the industrial field before 1925. R. 715–16, 723–4, 727–8. Its sales of rivets in 1933 were $390,534 and in 1939 $1,011,527. R. 723–4. It has built up its business by natural growth in the competitive field in competition with other companies. R. 727–30. It has between 800 and 1,000 machines on lease and has sold more than 2,000—how many more does not appear. R. 721–2.

The Milford Rivet and Machine Company began business at some time between 1927 and 1930. R. 230. It leases machines and also sells them. This company has 269 machines on lease and has sold 254 machines. R. 812–813.

The National Rivet Company was organized in 1928. It

began business on a capital of $20,000, of which one-half was borrowed. R. 708–9. Its business has had a rapid growth. R. 689–90. It has sold 207 machines and has 96 on lease. R. 691.

The Shelton Tack Company began to make tubular and bifurcated rivets about ten years before 1940, and began to put out machines about five years later. R. 276. It leases and sells setting machines. It has 45 setting machines on lease and has sold 146 machines. R. 812.

A number of other companies sell rivets in the industrial field but do not furnish machines, engineering advice, or service for machines. R. 231–233, 465–466, 588–589, 611–612, 634–635, 800. These companies include the Manufacturers Belt Hook Company, the Atlas Tack Corporation, the Continental Screw Company, Reed & Prince, Progressive Manufacturing Company, J. W. Coombs Manufacturing Company, New Jersey Rivet Company and the Townsend Company. R. 231–233, 293–296, 310–311. The testimony showed the 1939 sales of five of these companies, which are stated below, but there was no evidence as to the sales of the other three. These companies cater only to that part of the trade in which the customers take the entire responsibility as to the selection and use of rivets and the sellers assume responsibility only for seeing that the rivets delivered are what the customers order. R. 611–12, 800.

For more than forty years the Tubular Rivet & Stud Company and the petitioner have been doing business under the leasing system, using leases which provided that only rivets of the lessors should be used in the leased machines. R. 148, 373, 631–632, 1014–1016. These two companies were the pioneers in the tubular and bifurcated rivet business and had the field to themselves at the start. R. 373, 631. They are the only companies which have followed the practice of leasing machines and not selling them. The rivet sales of these two companies for the year 1925, which is the

first year for which sales of both companies appear in the record, and for the year 1939, were as follows:

	1925	1939
Tubular Rivet & Stud Co. (R. 813–814)	$2,390,449.80	$1,331,550.98
Judson L. Thomson Mfg. Co. (Com. Ex. 4, R. 150, printed R. 1093)	1,445,676.38	1,243,927.86

The record shows that the 1939 sales of rivets by all of the companies which have been referred to were as follows:

Tubular Rivet & Stud Co. (R. 813–814)	$1,331,550.98	
Judson L. Thomson Mfg. Co. (Com. Ex. 4, R. 150, 1093)	1,243,927.86	
Total sales of these two companies under leasing policies	————	$2,575,478.84
Penn Rivet Corporation, R. 524	307,000.00	
E. B. Stimpson Co., R. 361–362	286,500.00	
Chicago Rivet & Machine Co., R. 724	1,011,527.00	
Milford Rivet & Machine Co., R. 812–813	396,574.00	
National Rivet Company, R. 689–690	390,000.00	
Shelton Tack Company, R. 812	213,225.00	
Total sales of the six companies which lease and also sell machines	————	2,604,826.00
Atlas Tack Company, R. 811	24,994.00	
New Jersey Rivet Company, R. 473	40,000.00	
Townsend Company, R. 582	300,000.00	

J. W. Coombs Mfg. Co., R. 621	39,000.00	
Manufacturers Belt Hook Co., R. 793–794	72,000.00	
Total sales of five companies which sell rivets but do not supply machines		475,994.00
Total 1939 sales which appear in the record		$5,656,298.84

The total rivet sales for 1939 for the four companies that began their rivet business in or after 1925 amounted to $2,011,326. This is much larger than the petitioner's sales for that year and about 80% of the combined sales of the petitioner and Tubular Rivet & Stud Company.

The Townsend Company, which does not put out machines, had been in the tubular and bifurcated rivet business only five years by 1939, by which time it had sales of $300,000 a year. R. 581–2.

At the present time there is a large market among industrial users of rivets that own their own machines. They have expert mechanical staffs that are able to service their machines and to order rivets under their own specifications that will work in them. While such customers are relatively few in number, they use large quantities of rivets. (See references, paragraph 38, page 13 above.) The Ford Motor Company is an example. That company owns all its machines outright and buys rivets on a competitive basis. R. 662–64. The petitioner once had the business of the Ford Motor Company and was selling rivets to it to the extent of $440,000 a year in 1925. The petitioner has lost practically all of this busines and sells less than $1,000 a year to this customer. R. 231. The majority of the machines sold by Penn Rivet Corporation are sold to large concerns including Ford Motor Company, General Motors and Westinghouse. R. 541.

An indication of the importance of the business of customers that own machines may be obtained by comparing the average sales for each machine on lease of Tubular Rivet & Stud Company and the petitioner, which confine themselves to leasing machines, with the similar sales for companies which both lease and sell machines. This comparison, made on the basis of the 1939 sales and the total number of machines leased by each, stated at pages 24–28 above, shows the following results:

Company	Machines leased	1939 Sales	Sales per machine
Tubular Rivet & Stud Company	7,412	$1,331,551	$179.65
Judson L. Thomson Mfg. Company	8,000	1,243,928	155.49
Penn Rivet Corporation	500	307,000	614.00
E. B. Stimpson Company	2,000	286,500	143.25
Chicago Rivet & Machine Company	800–1,000	1,011,527	between 1,264.41 and 1,011.53
Milford Rivet & Machine Company	269	396,574	1,474.25
National Rivet Company	96	390,000	4,062.50
Shelton Tack Company	45	213,225	4,738.33

The only reasonable explanation of these differences in sales per machine is that there is a large market for rivets among customers that own their machines and that a very substantial part of the sales of the last four companies have been made in this market.

Additional facts bearing on the issue as to whether the finding of the Commission as to lessening of competition was supported by the testimony are stated in this brief at pages 39–44 below.

SPECIFICATIONS OF ERRORS.

The petitioner has specified the errors which it claims were made by the Circuit Court of Appeals in the petition for certiorari at pages 18–22 above. The specifications of errors there made are adopted for the purpose of this brief without repeating them.

ARGUMENT.

Whether the order of the Commission was properly made depends on the answers to the following questions:

1. Does the condition in the petitioner's leases that the lessees shall not use in the leased machines any rivets except those made and sold by the petitioner constitute a condition that the lessees shall not use rivets of competitors?

2. Is the finding of the Commission that the effect of the petitioner's leases might be to substantially lessen competition supported by the testimony?

3. Did the Commission make such findings of fact as are required by Section 11 of the Clayton Act?

Unless the answers to all of these questions are in the affirmative, the judgment of the Circuit Court of Appeals should be reversed and the order of the Commission should be set aside. The petitioner submits that none of the questions should be answered in the affirmative.

I. The Condition in the Petitioner's Lease Was Not A Condition that its Lessees Should Not Use Rivets of Competitors.

The petitioner contended before the Circuit Court of Appeals, and now contends, that the condition in the petitioner's lease that the lessee should not use the leased machines for setting any other rivets than those made and sold by the petitioner did not expressly require that lessees

should not use rivets of competitors, nor did it have the practical effect of preventing them from using such rivets, and therefore the use of this clause in the petitioner's leases did not violate the provisions of Section 3 of the Clayton Act.

The Circuit Court of Appeals took a contrary view, and held that the clause in question constituted an express condition that the lessee should not use rivets of competitors, and therefore the practical effect of it had no bearing on this point, but only on the question as to whether competition was lessened. R. 1117–20.

It is submitted that the decision of the Circuit Court of Appeals on this point is squarely in conflict with the decision of this Court in *Federal Trade Commission* v. *Sinclair Refining Company,* 261 U.S. 463. By that decision, this Court affirmed decrees of Circuit Courts of Appeals for the Seventh and the Third Circuits which had set aside orders of the Federal Trade Commission issued against certain well-known distributors of gasoline. The following is a summary of the facts which were involved:

The Federal Trade Commission, after hearing separate complaints brought by it against thirty or more refiners or wholesalers of gasoline, ordered them to cease and desist from the practice of leasing gasoline pumps and underground tanks to retail dealers on the condition that the equipment should be used only with gasoline supplied by the lessors. These complaints alleged that the leases violated Section 3 of the Clayton Act and also Section 5 of the Federal Trade Commission Act (38 Stat. 717; 15 U.S.C. Sec. 45), which prohibited unfair methods of competition in interstate commerce. The complaint against the Sinclair Refining Company alleged that it leased its equipment "on the condition, agreement or understanding that the lessees thereof shall not purchase or deal in the products of a competitor or competitors of respondent" (261 U.S.

463, 467). The testimony and the findings of the Commission showed that the leases merely provided that the equipment should be used by the lessees for the sole purpose of storing and handling the gasoline supplied by the lessor (261 U.S. 463, 469) and that they did not contain any other agreement restricting the lessees as to whose product they should handle. The lessor leased the equipment at a nominal rental as a means of promoting the sale of its gasoline. The testimony also showed that a number of competing companies were engaged in selling gasoline, and that the lessees of the equipment were in fact free to put in equipment of others if they chose and to sell gasoline of others in it, and that other equipment could be leased from several sources and could also be purchased for from $300 to $500.

The Commission found that only a small proportion of the lessees required more than a single pump, that many competitors did not possess capital enough to purchase and lease similar equipment, and that partly by reason of this such competitors had lost numerous customers to the companies which leased equipment on the terms stated; and that the effect of the practice might be to substantially lessen competition in the business of selling petroleum products.

The Commission concluded that these leases violated Section 5 of the Federal Trade Commission Act and that they also violated Section 3 of the Clayton Act, and ordered the various respondents to cease and desist from leasing equipment under the agreement that it should be used only for storing or handling products of the lessor. The foregoing facts are stated in the opinion in *Federal Trade Commission* v. *Sinclair Refining Company*, 261 U.S. 463.

The Commission made similar findings, conclusions and orders on the various complaints. Certain of the respondents brought petitions to review these orders, which were heard by Circuit Courts of Appeals in four different cir-

cuits. Each court held that under the circumstances the leases did not constitute a violation of the Clayton Act or of the Federal Trade Commission Act, and set the order of the Commission aside.

Standard Oil Co. of New York v. *Federal Trade Commission,* 273 Fed. 478 (Second Circuit).

Canfield Oil Co. v. *Federal Trade Commission,* 274 Fed. 571, (Sixth Circuit).

Sinclair Refining Co. v. *Federal Trade Commission,* 276 Fed. 686, (Seventh Circuit).

Standard Oil Co. (New Jersey) v. *Federal Trade Commission,* 282 Fed. 81, (Third Circuit).

Certiorari was granted in several of these cases. This Court unanimously confirmed the decrees setting aside the orders of the Commission. In dealing with the question as to whether there was any violation of Section 3 of the Clayton Act, this Court said, at pages 473–474 of the opinion:

> "Respondent's written contract does not undertake to limit the lessee's right to use or deal in the goods of a competitor of the lessor, but leaves him free to follow his own judgment. It is not properly described by the complaint and is not within the letter of the Clayton Act. But counsel for the Commission insist that inasmuch as lessees generally—except garage men in the larger places—will not encumber themselves with more than one equipment, the practical effect of the restrictive covenant is to confine most dealers to the products of their lessors; and we are asked to hold that, read in the light of these facts, the contract falls within the condemnation of the statute. *Standard Fashion Co.* v. *Magrane-Houston Co.,* 258 U.S. 346, and *United Shoe Machinery Corporation* v. *United States,* 258 U.S. 451, are relied upon.

"In the *Standard Fashion Co. Case* the purchaser expressly agreed not to sell or permit sale of any other make of pattern on its premises. It had a retail store in Boston and sales elsewhere were not within contemplation of the parties. This Court construed the contract as embodying an undertaking not to sell other patterns. In *United Shoe Machinery Corporation* v. *United States,* when speaking of certain 'tying' restrictions, this Court said—

" 'While the clauses enjoined do not contain specific agreements not to use the machinery of a competitor of the lessor, the practical effect of these drastic provisions is to prevent such use. We can entertain no doubt that such provisions as were enjoined are embraced in the broad terms of the Clayton Act which cover all conditions, agreements or understandings of this nature. That such restrictive and tying agreements must necessarily lessen competition and tend to monopoly is, we believe, equally apparent. When it is considered that the United Company occupies a dominating position in supplying shoe machinery of the classes involved, these covenants signed by the lessee and binding upon him effectually prevent him from acquiring the machinery of a competitor of the lessor except at the risk of forfeiting the right to use the machines furnished by the United Company which may be absolutely essential to the prosecution and success of his business. This system of 'tying' restrictions is quite as effective as express covenants could be and practically compels the use of the machinery of the lessor except upon risks which manufacturers will not willingly incur.'

"There is no covenant in the present contract which obligates the lessee not to sell the goods of another; and its language cannot be so construed. Neither the

findings nor the evidence show circumstances similar to those surrounding the 'tying' covenants of the Shoe Machinery Company. Many competitors seek to sell excellent brands of gasoline and no one of them is essential to the retail business. The lessee is free to buy wherever he chooses; he may freely accept and use as many pumps as he wishes and may discontinue any or all of them. He may carry on business as his judgment dictates and his means permit, save only that he cannot use the lessor's equipment for dispensing another's brand. By investing a comparatively small sum, he can buy an outfit and use it without hindrance. He can have respondent's gasoline with the pump or without the pump, and many competitors seek to supply his needs."

The language which has been quoted contains all of the reasons stated in that part of the opinion which dealt with the alleged violation of the Clayton Act.

It is difficult to imagine a more direct conflict than that which exists between the decision of the Circuit Court of Appeals in the case at bar and the decision of this Court in the *Sinclair Refining Company* case. The Circuit Court of Appeals holds that every condition in a lease of a machine that it shall not be used for goods of competitors of the lessor is of itself a condition that the lessee will not use goods of competitors within the meaning of the Clayton Act. This Court, in the *Sinclair Refining Company* case, declared that a lease of a gasoline pump and tank on the condition that it should be used only for gasoline of the lessor was not properly described by the complaint as a lease on the condition that the lessee should not use gasoline of competitors, and was not within the letter of the Clayton Act, and that as the lessee was free to use gasoline of competitors in other outfits, which were readily

available to him, the terms of the lease did not have the practical effect of compelling him to use the lessor's gasoline or limit his right to use gasoline of a competitor.

In the case at bar the Circuit Court of Appeals held that the practical effect of the lease had no bearing on the question whether it was on the condition that the lessees should not use rivets of competitors. On this point, the decision in the case at bar is in conflict not only with the decision of this Court in the *Sinclair* case, but also in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Standard Oil Co.* v. *Federal Trade Commission*, 282 Fed. 81. In that case, which was one of the gasoline pump decisions which were affirmed by this Court in the *Sinclair Refining Company* case, the Circuit Court of Appeals held that the tying clause was to be construed, not by its terms alone, but by its effect as well (282 Fed. 81, 88).

The facts in the case at bar make the argument for setting the order of the Commission aside stronger than it was in the *Sinclair Refining Company* case. In both cases,

(1) The lessor furnished the equipment primarily to promote the sale of its product.

(2) The leases provided merely that the equipment should not be used with products of others and did not provide that lessees should not use the products of others.

(3) The leased equipment was not essential to the business of the lessees because other equipment of the same kind was available that would do their work properly.

(4) The lessees could at their option lease such equipment from others or buy it if they chose at prices which were substantially the same in the two cases. In the *Sinclair* case the cost of the equipment was $300 to $500 (261 U.S. 463 at 475). In the case at bar the more popular types of machines sell for around $300. Finding of the Commission. R. 38.

(5) There was active competition in the industry.

(6) The reputation of the lessor might be damaged as a result of the use of products of others in the equipment. See paragraph 37, page 13 above.

In the case at bar there are the following reasons for the use of the clause, and no corresponding ones appeared in the gasoline pump cases:

(a) Rivets of others usually do not work properly in the petitioner's machines.

(b) There are rivets on the market that will damage the petitioner's machines if used in them.

(c) In the case at bar rivet setting machines are usually specially designed or fitted out for the particular work and cannot be of a few standard designs. It is important to many lessees to lease rivet setting machines because in this way they avoid losses from obsolescence when they have to change machines as a result of changes in their products. As rivet setting machines cannot be standard, the business of leasing them is more hazardous than that of leasing pumps would be, and if the incentive to lease machines in order to promote rivet sales were removed, the use of rivets in industry would be curtailed. R. 738–40.

The decisions of this Court in *United Shoe Machinery Corporation* v. *United States,* 258 U.S. 451, and *International Business Machines Corporation* v. *United States,* 298 U.S. 131, do not modify the effect of the decision in the *Sinclair Refining Company* case on the point under consideration.

In the *Shoe Machinery* case the leased machines were patented, and were essential to a shoe manufacturer's business because they could not be supplied by any competitors of the lessor. Consequently, as was pointed out by this Court in the opinion in the *Sinclair Refining Company* case which has been quoted, tying clauses in those leases had the practical effect of preventing the use of goods of a competitor.

In the *International Business Machines Corporation* case, that company leased machines which would perform certain tabulations and computations by the use in them of cards on which data were recorded by perforations. The machines were patented. These machines were the only ones that were operated by electrical impulses, and were, as the Trial Court found, "commonly recognized to be superior in many ways to other machines which may be used for the same purposes" (*United States* v. *International Business Machines Corporation*, 13 F. Supp. 11–13). International dominated the trade to such an extent that it put out about 85% of all such machines in use for such purposes. While its chief competitor, Remington Rand, Inc. leased machines for performing the same functions, its machines were operated mechanically. Any customer who wished to use machines of the electrical type could obtain them only from International. This Court held that the International leases violated Section 3 of the Clayton Act. The case was essentially like the *Shoe Machinery* case, and it was not like the case at bar or the *Sinclair Refining Company* case, in both of which the lessees could obtain equipment like the leased machines from other sources which would do their work equally well.

The petitioner therefore submits that the Circuit Court of Appeals was in error in holding and ruling that the petitioner was leasing machines on the condition that the lessees should not use rivets of competitors; and that the Circuit Court of Appeals should have ruled that the petitioner's leases are not within the purview of Section 3 of the Clayton Act if they do not have the practical effect of preventing the use of rivets of its competitors, and that the findings of the Commission do not show that the petitioner was leasing machines on the condition, agreement or understanding that the lessee should not use or deal in rivets of competi-

tors and the testimony in the case will not support that conclusion.

II. The Finding of the Commission as to the Effect of the Petitioner's Leases on Competition Is Not Supported by Testimony.

In considering this issue it should be noted that the expression in Section 3 of the Clayton Act "where the effect of such lease . . . may be to substantially lessen competition or tend to create a monopoly" . . . "was intended to prevent such agreements as would, under the particular circumstances probably lessen competition or create an actual tendency to monopoly", and that it was not intended to "prohibit the mere possibility of the consequences described."

> *Standard Fashion Company* v. *Magrane-Houston Company,* 258 U.S. 346, 356–357.

The Commission found that the effect of the condition used by the petitioner in its leases has been, is and may be to substantially lessen competition in the sale of tubular and bifurcated rivets, and that this effect is materially increased by the similar practices of other companies that lease machines. R. 41.

The findings of the Commission on which this conclusion is presumably based are stated in paragraph 43 of the petition for certiorari at pages 15–16 above. They come down to this: that competitors which make rivets suitable for use in the petitioner's machines are prevented by the petitioner's leases from selling rivets for use in such machines; that the market is restricted to the extent that the petitioner is successful in leasing its machines; and that as the petitioner owns a substantial portion of all leased machines and sells a substantial amount of rivets, competition is substantially lessened by the condition in the petitioner's

leases. That seems also to be the reasoning of the Circuit Court of Appeals. See opinion R. 1124–5.

The "testimony of representatives of various companies" that the Commission referred to as indicating that the outlet for rivets was contracted by the leasing practice of the petitioner (R. 40–41, paragraph nine) was given by the witnesses Edwards, Van Name, Weidner, Coombs and Bauer, who were officers of companies that make rivets but do not put out machines. They testified in substance that they could make rivets that would work successfully in the petitioner's machines, and some of them testified that in many cases they had been unable to sell rivets to persons who had machines under leases. Edwards, R. 161, 166, 169, 173; Van Name, R. 461–2, 470; Weidner, R. 584–6, Coombs, R. 621; Bauer, R. 795.

In considering the effect of this testimony, it should be noted that the companies that sell rivets but do not supply machines cannot satisfy the customers that desire a complete riveting service.

As the customers who lease machines ordinarily desire a complete riveting service, the failure of such customers to buy rivets from companies that do not furnish machines or service should not be ascribed to the condition in the petitioner's leases. On this point, it is significant that not one of the numerous customers of the petitioner who testified in this case stated that he was forced by the petitioner's lease to use the petitioner's rivets against his wishes, or made any complaint as to the petitioner's method of doing business and many of them praised it as advantageous to them. (See references in paragraph 26, page 9 above.)

Furthermore, even if the testimony were to be taken as showing that certain companies were unable to obtain business from some customers because the petitioner offered these customers a superior inducement through its leases, it would not show that competition has been lessened, but

merely that the petitioner has succeeded in the existing competition. That will appear clearly by a comparison of the case at bar with the *Sinclair Refining Company* case and the other gasoline pump cases which have been described. In those cases the Commission made substantially the same findings as to the lessening of competition that are made in the case at bar. Those findings, which are stated in the opinion of the *Sinclair Refining Company* case, 261 U.S. 463, at 467–471, have been summarized at pages 31–32 of this brief. The findings of the Commission in the *Sinclair* case in certain respects went farther than those in the case at bar; for they included a finding that most customers used only one pump and that many competitors who sold gasoline did not have capital enough to purchase pumps. There are no comparable findings in the present case.

In the *Sinclair Refining Company* case, as appears from the references at pages 16–19 of the brief for the Commission filed in that case in this Court, various competitors testified that they were unable to sell gasoline to a dealer that had a leased pump. As appears on page 35 of the same brief, the testimony also showed that the Standard Oil Company of New Jersey, the respondent in one of the cases decided by this Court, had approximately 42% of the dealers in a large interstate territory under leases containing the clause in question, and that in some districts practically all dealers were under contract either with the Standard Oil Company of New Jersey or other wholesale marketers and that outside competitors found themselves unable to sell gasoline to these dealers.

This Court was of the opinion that the testimony which has been referred to was not sufficient to show that the probable effect of the practice complained of would be to unduly lessen competition, and so stated in the part of its opinion that related to the unfair competition aspect of the case. (261 U.S. 463, 475.)

The decision of the two Circuit Courts of Appeals that were affirmed in the *Sinclair Refining Company* case are also directly in point on this question as to effect on competition. In *Standard Oil Co.* v. *Federal Trade Commission*, 282 Fed. 81, the Circuit Court of Appeals for the Third Circuit said (at pages 87 and 89):

> "Concededly, a lease of a curb pump outfit without rental gives a wholesaler a trade advantage over its competitors. This alone is not unlawful, for such advantage is the object of all competition and is attained whenever one sells another goods of greater excellence or at lower prices than goods offered by others. . . .
>
> "The contract leaves every competitor free to persuade the retailer to install an additional outfit or to replace the outfit already installed by one of its own; and permits the retailer to yield if he chooses. While the effect of the restrictive clause of the contract in these cases may make competition somewhat more difficult because of the inclination of a satisfied retailer to stand by his wholesaler until another comes along and offers him something better, we are of opinion that the clause does not thereby lessen competition between wholesalers to the extent contemplated by the statute and that a tendency to monopolize the wholesale trade has not been disclosed."

The Circuit Court of Appeals for the Seventh Circuit in its decision in *Sinclair Refining Co.* v. *Federal Trade Commission*, 276 Fed. 686, said at page 688:

> "Competition is not an unmixed good. It is a battle for something that only one can get; one competitor must necessarily lose. The weapons in competition are various. Superior energy, more extensive advertising, better articles, better terms as to time of delivery, place

of delivery, time of credit, interest or no interest, freights, methods of packing, lower prices, more attractive and more convenient packages, superior service, and many others, are and always have been considered proper weapons. . . . Petitioner said:

> 'Here is a container and a pump; you may take and use them for the storage and pumping of gasoline bought from us; if you wish to use them otherwise, you may and must buy them.'
>
> "In kind, that is nothing more than loaning a barrel, with a faucet in it. The fact that the tank and pump are much more expensive does not make the transaction different nor unfair. If that is not true, then the law must mean that the Trade Commission is set as a watch on competitors, with the duty and power to judge what is too fast a pace for some and to compel others to slow up; in other words, to destroy all competition except that which is easy."

As these cases show, the fact that certain competitors, which are unwilling or unable to furnish machines, find that they cannot get the business of customers who prefer what the petitioner has to offer, does not show that competition is lessened if, as is true in this case, the petitioner has no monopoly on machines or its methods of doing business, and any competitor with sufficient capital and business ability is free to do for a customer exactly what the petitioner does.

It is also significant, on the issue of the effect on competition, that the rivet business of the petitioner has decreased while that of its competitors has increased. The facts on this point have been collected in this brief at pages 26–28 above.

The testimony also shows, as the Trial Examiner reported, that competition in the rivet business has been active for a long time, and has become more active in recent years. R. 61, 179, 230–31, 234, 237, 369, 709–10, 729–30, 900–1.

The testimony also shows that although any competent rivet manufacturer can duplicate the petitioner's rivets, in actual practice he could not afford to do so for any ordinary order, because of the cost of changing tools and gauges that would be involved, but would furnish one of his own rivets made without changing his tools and gauges, and that the rivets so furnished could not be depended on to work satisfactorily in the petitioner's machines. See facts and references in paragraphs 29–38, pages 11 to 13 above.

There was much more testimony bearing on the issue on the effect on competition than can be referred to within the limits of this brief. This may be found in the respondent's Statement of Facts Proved, paragraphs 33–64 (R. 106-137), and in the pages of the record there referred to, which may be found in the printed record by using the bracketed numbers. The Trial Examiner verified the references to the record in this Statement of Facts Proved and found them to be correct. R. 62.

It is submitted that enough has been stated in the petition for certiorari and in this brief to show that the judgment of the Circuit Court of Appeals in the case at bar, and the findings of the Commission as to the effect of the petitioner's leasing practice on competition, are based on an erroneous concept of what constitutes lessening of competition, which is in conflict with the decisions which have been referred to, and that they are not supported by the testimony; and that for these reasons certiorari should be granted and the judgment of the Circuit Court of Appeals should be reviewed by this Court, and should be reversed.

III. The Commission Did Not Make Such Findings of Fact as Are Required by Section 11 of The Clayton Act.

Section 11 of the Clayton Act gives a right to have orders of the Federal Trade Commission reviewed by the United States Circuit Courts of Appeals. The material portion of Section 11 is printed as an appendix to this brief. It provides that the Commission shall make a report in writing in which it shall state its findings as to the facts, and that in any proceeding for a review of its order the Commission shall file in the Circuit Court of Appeals a transcript of the entire record including all the testimony taken and the report and order of the Commission, and that the Court shall have power to make a decree affirming, modifying or setting aside the order of the Commission. This section also provides that the findings of the Commission as to the facts, if supported by testimony, shall be conclusive.

The determination of what constitutes the acts prohibited by Section 3 of the Clayton Act necessarily involves a construction of the statute. It is the evident purpose of Section 11 to require the Commission to set out all the facts that are material in determining whether the acts prohibited by the statute have been committed, and to give the court the right to decide whether the facts found were supported by the testimony, and whether they warrant the conclusion of the Commission that the statute has been violated.

The Commission cannot deprive the court of its power by making its findings in the form of general conclusions in the language of the statute, and omitting findings as to the basic facts which were shown by the testimony.

Federal Trade Commission v. *Gratz*, 253 U.S. 421.
Federal Trade Commission v. *Curtis Publishing Co.*, 260 U.S. 568.
Helvering v. *Tex-Penn Oil Co.*, 300 U.S. 481.

In *Federal Trade Commission* v. *Curtis Publishing Company*, 260 U.S. 568, which involved an alleged violation of Section 3 of the Clayton Act, the court said, at page 579,

> "We have heretofore pointed out that the ultimate determination of what constitutes unfair competition is for the court, not the Commission; and the same rule must apply when the charge is that leases, sales, agreements or understandings substantially lessen competition or tend to create monopoly."

In *Helvering* v. *Tex-Penn Oil Company*, 300 U.S. 481, the Supreme Court held that findings of circumstantial facts found by the Board of Tax Appeals must be taken as true if supported by substantial evidence, but that this did not apply to the ultimate finding based on those facts. The court said, at page 491,

> "The ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact. It is to be distinguished from the findings of primary, evidentiary or circumstantial facts. It is subject to judicial review and, on such review, the court may substitute its judgment for that of the board."

The reasons why an order of the Commission should not be sustained if it fails to state the basic facts which are material to a determination of the case are stated convincingly by the Court of Appeals for the District of Columbia in *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 96 F. 2d 554 (certiorari denied 305 U.S. 613). In reversing an order of the Federal Communications Commission in which the Commission had stated general conclusions but had not made findings of the basic facts which were put in issue, the court said (p. 559):

> "The requirement that courts, and commissions acting in a quasi-judicial capacity, shall make findings of

fact, is a means provided by Congress for guaranteeing that cases shall be decided according to the evidence and the law, rather than arbitrarily or from extralegal considerations: . . . When a decision is accompanied by findings of fact, the reviewing court can decide whether the decision reached by the court or commission follows as a matter of law from the facts stated as its basis, and also whether the facts so stated have any substantial support in the evidence. In the absence of findings of fact the reviewing tribunal can determine neither of these things. . . .

The process necessarily includes at least four parts: (1) evidence must be taken and weighed, both as to its accuracy and credibility; (2) from attentive consideration of this evidence a determination of facts of a basic or underlying nature must be reached; (3) from these basic facts the ultimate facts, usually in the language of the statute, are to be inferred or not, as the case may be; (4) from this finding the decision will follow by the application of the statutory criterion."

In the case at bar the Commission has failed to make any findings as to many material basic facts which were shown by the testimony. Certain of the most important of these facts are stated in the petition for certiorari in paragraphs 12 to 16, 18, 23, 24 (first sentence), 25 to 27, and 29 to 39, and the omission of them is referred to in paragraph 44 of the petition and in the fifth reason assigned for granting the writ.

The following illustrations will show how important some of these omitted facts are:

The Trial Examiner reported that rivet manufacturers and purchasers and users of rivets testified that a user of rivets and rivet setting machines is free to choose whether he will secure machines and rivets under the leasing plant

or whether he will buy machines and purchase rivets from the competing manufacturers; that he can obtain machines and rivets under either plan which will do his work; and that customers who lease the petitioner's machines frequently use machines and rivets supplied by competitors and the petitioner has never objected to this use of competitor's rivets or machines. R. 61. The testimony referred to by the Examiner is cited in paragraphs 18 and 24 at pages 7 to 9 above. It fully supports his statements. In the gasoline pump cases, which included the *Sinclair Refining Company* case, this Court and the Circuit Courts of Appeals for the Third and the Seventh Circuits based their decisions largely on just such facts, as has already been shown. Nevertheless, the Commission in the case at bar has made no findings as to these facts.

The failure of the Commission to find the facts is particularly damaging to the petitioner when the effect of the petitioner's leasing practice on competition is being considered. For example, the Trial Examiner reported that witnesses familiar with the rivet business testified that competition had been active for a long time and has become more active in recent years. R. 61. The record completely supports that statement. R. 179, 230–2, 234, 237, 369, 729–30, 900–1. It was also shown that the rivet sales of the petitioner and Tubular Rivet & Stud Company, both of which followed the practice complained of, have decreased while those of their competitors have increased (pages 10 to 11, 26 to 28 above). The Commission makes no findings on these points.

Another example will show how the omission of findings of material facts may change the implication from facts which were found. The Commission found that the petitioner's rivets could be duplicated by any competent rivet manufacturer. R. 40. That was not questioned at the trial. It was also shown, however, largely by the testimony of

witnesses called by the Commission, that rivets will not work properly in a machine unless the machine and the rivets are made with precision and the rivets are made to the specifications for which the machine is designed; that each rivet manufacturer makes rivets according to his own design and rivets made by one manufacturer will usually not be identical with those made by another; that in actual practice a rival rivet manufacturer usually would not duplicate the petitioner's rivets exactly, because in order to do so he would have to change his tools and gauges and it would not pay him to do this for any ordinary order, and consequently he would substitute the nearest rivet of his own line; that there are many rivets on the market that are not suitable for use in the petitioner's machines; and that eleven witnesses who attempted to use rivets of others in the petitioner's machines found that they had not worked satisfactorily. It was also shown that there were some rivets on the market which were so carelessly or poorly made that they would damage or break machines in which they were used. References to the testimony showing these facts will be found in paragraphs 29 to 39 at pages 11 to 14 above.

Other persuasive testimony which was material as to the effect on competition is referred to in paragraphs 12 to 16, and 25 to 27 at pages 5 to 10 above. Although this testimony was specially called to the attention of the Commission either by the Trial Examiner's Report or by the Respondent's Statement of Facts Proved, the Commission ignored it. Practically all of this testimony was uncontradicted and it is not conceivable that the Commission refused to believe any of the witnesses who gave it.

The petitioner submits that it was the duty of the Commission under Section 11 to make findings with respect to these material facts. The petitioner was entitled to go before the Circuit Court of Appeals either with these facts found, or if the Commission drew other inferences of fact

from the testimony, with such findings of the facts as the Commission drew from that testimony. If such findings had been made, the Circuit Court of Appeals and this Court could examine the record and determine whether the findings of the Commission as to the facts were supported by the testimony and whether its conclusions were consistent with such findings as were so supported. On the record now presented, no certainty is possible as to how the Commission reached its conclusions.

This Court has recently set aside an order of the Interstate Commerce Commission because the Commission failed to find the basic facts on which its conclusion depended. *North Carolina et al.* v. *United States et al.*, Nos. 560–561, decided June 11, 1945.

The petitioner therefore submits that the Circuit Court of Appeals should have set aside the order of the Commission because the Commission failed to find the basic facts required by Section 11 of the Clayton Act, and that this Court should grant certiorari to correct the error of the lower court in failing to do so.

HARRY LEBARON SAMPSON,
ANDREW MARSHALL,
Counsel for Petitioner.

APPENDIX.

SECTION 11 OF CLAYTON ACT (38 STAT. 734; 15 U.S.C. SEC. 21).

"SEC. 11. That authority to enforce compliance with sections two, three, seven and eight of this Act by the persons respectively subject thereto is hereby vested: In the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Authority where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:

"Whenever the commission, authority, or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. . . . The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission, authority or board. If upon such hearing the commission, authority, or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it

shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, . . .

"If such person fails or neglects to obey such order of the commission, authority, or board while the same is in effect, the commission, authority, or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission, authority, or board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission, authority, or board. The findings of the commission, authority, or board as to the facts, if supported by testimony, shall be conclusive. . . .

"Any party required by such order of the commission, authority, or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission, authority or board be set aside. A copy of such petition shall be forthwith served upon the commission, authority, or board, and thereupon the commission, authority or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript

the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission, authority, or board as in the case of an application by the commission, authority or board for the enforcement of its order, and the findings of the commission, authority or board as to the facts, if supported by testimony, shall in like manner be conclusive."